Supreme Court, U.S.
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No.

In the Supreme Court of the United States

AMERICAN ISUZU MOTORS INC., BANK OF AMERICA, N.A., BARCLAYS BANK PLC, BRISTOL-MYERS SQUIBB COMPANY, BP P.L.C., CHEVRONTEXACO CORPORATION, *ET AL.*

Petitioners,

v.

LUNGISILE NTSEBEZA, HERMINA DIGWAMAJE, KHULUMANI SUPPORT GROUP, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
MARC R. COHEN
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

FRANCIS P. BARRON
Counsel of Record
DAVID GREENWALD
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

[Additional Counsel listed on signature page]

QUESTIONS PRESENTED

These lawsuits were filed on behalf of all persons living in South Africa between 1948 and 1994 claiming injury from that nation's system of apartheid. The defendants are more than 50 U.S. and foreign corporations that allegedly did business in South Africa during that era. Plaintiffs contend that, by conducting business in South Africa, the defendants aided and abetted violations of international law committed by the apartheid-era South African government and, for that reason, may be held liable under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.

The questions presented are:

1. Whether, in light of the opposition to this litigation expressed by the Executive Branch, by South Africa, and by other nations – because plaintiffs' suits effectively seek to overturn South Africa's post-apartheid policy of reconciliation as well as the policies of the United States and other nations – the cases should be dismissed on grounds of case-specific deference to the political branches, political question, or international comity.

2. Whether a private defendant may be sued under the ATS for aiding and abetting a violation of international law by a foreign government in its own territory.

3. Whether a private defendant may be held directly liable under the ATS for violating international law standards codified in a ratified treaty that Congress expressly provided does not create enforceable rights.

RULE 14.1(b) STATEMENT

Defendants who were parties to the appeal include: American Isuzu Motors Inc.; Bank of America, N.A.; Barclays Bank PLC; Bristol-Myers Squibb Company; BP p.l.c.; ChevronTexaco Corporation; Chevron Texaco Global Energy, Inc.; Citigroup, Inc.; The Coca-Cola Company; Colgate-Palmolive Company; Commerzbank AG; Credit Suisse Group; Daimler AG; Deutsche Bank AG; The Dow Chemical Company; Dresdner Bank AG; E.I. Dupont deNemours; EMS-Chemie (North America) Inc.; Exxon Mobil Corporation; Ford Motor Company; Fujitsu Limited; General Electric Company; General Motors Corp.; Hewlett-Packard Company; Holcim (US) Inc.; Honeywell International Inc.; International Business Machines Corporation; JPMorgan Chase & Co.; 3M Co.; National Westminster Bank Plc; Nestlé USA, Inc.; Shell Oil Company; UBS AG; and Xerox Corporation.

Defendants below that were not served or that contested service or personal jurisdiction include: Anglo-American PLC; Banque Indosuez; CALTEX; Credit Lyonnais; DeBeers Corp.; Fluor Corp.; Holcim Ltd; Novartis AG; Oerlikon Buhrle; Oerlikon Contraves; Rheinmetall Group AG; Rio Tinto Group; Royal Dutch Petroleum Co.; Shell Transport & Trading Co. Plc; Schindler A.G.; Standard Chartered Bank; Sulzer AG; Total SA; Unisys Corp.; and Volkswagen A.G.

RULE 29.6 STATEMENT

Petitioner Isuzu Motors America, Inc., as successor in interest to American Isuzu Motors Inc., states that its parent corporation is Isuzu Motors Limited, and further states that, aside from the aforemen-

tioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner Bank of America, N.A. states that it is an indirect subsidiary of Bank of America Corporation, and that it is 100% owned by Bank of America Corporation.

Petitioner Barclays Bank PLC states that its parent corporation is Barclays PLC and further states that, aside from the aforementioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner Bristol-Myers Squibb Company states it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner BP p.l.c. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner ChevronTexaco Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Chevron Texaco Global Energy, Inc. states that its parent corporation is Texaco Overseas Holding, Inc. and further states that, aside from the aforementioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner Citigroup, Inc. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock. The *Digwamaje* plaintiffs have named "Citicorp/Citibank." Citicorp and Citibank, N.A. are wholly-owned indirect subsidiaries of Citigroup, Inc. and are not publicly traded.

Petitioner The Coca-Cola Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Colgate-Palmolive Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Commerzbank AG states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

Petitioner Credit Suisse Group states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Daimler AG states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Deutsche Bank AG states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner The Dow Chemical Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Dresdner Bank AG states that its parent corporation is Allianz Societas Europaea, München, Germany (Allianz SE) and further states that, aside from the aforementioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner E.I. Dupont deNemours states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner EMS-Chemie (North America) Inc. is a subsidiary of EMS-Grilon Holding Inc., Wilmington, and EMS-Chemie AG, Domat/Ems Switzerland.

EMS Grilon Holding Inc. is wholly owned by EMS-Chemie Holding AG and EMS-Chemie AG, Domat/Ems Switzerland. EMS-Chemie Holding AG, Domat/Ems Switzerland is wholly owned by EMS-Chemie Holding AG. EMS-Chemie Holding AG is publicly traded in Switzerland.

Petitioner Exxon Mobil Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Ford Motor Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Fujitsu Limited states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner General Electric Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner General Motors Corp. states that it has no parent corporation. Except for a subsidiary of State Street Corporation, called the State Street Bank and Trust Company, which owns General Motors Corp. common stock in fiduciary capacities for employee benefit plans, no publicly held corporation owns 10% or more of General Motors Corp. stock.

Petitioner Hewlett-Packard Company states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Holcim (US) Inc. states that its parent corporation is Holcim Ltd, and further states that, aside from the aforementioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner Honeywell International Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Petitioner International Business Machines Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner JPMorgan Chase & Co. states that it has no parent corporation and further states that no publicly held company owns 10% or more of its stock.

Petitioner 3M Co. states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner National Westminster Bank Plc states that it is a wholly owned subsidiary of The Royal Bank of Scotland plc, which in turn is a wholly owned subsidiary of The Royal Bank of Scotland Group plc, which is publicly traded on the FTSE.

Petitioner Nestlé USA, Inc. states that its parent corporation, through an intermediate holding company, is Nestlé S.A., and further states that, aside from the aforementioned parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner Shell Oil Company states that it is a wholly owned subsidiary of Shell Petroleum Inc., which is an indirect wholly owned subsidiary of Royal Dutch Shell plc, and further states that, aside from that indirect, ultimate parent corporation, no publicly held company owns 10% or more of its stock.

Petitioner UBS AG states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner Xerox Corporation states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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The opinion of the court of appeals is reported at 504 F.3d 254 and is reprinted in the Appendix to this petition. (App. 1a-180a). The order denying the motion to stay the mandate (App. 214a-235a) is not reported but is available at 2007 WL 4180152 (2d Cir. Nov. 27, 2007). The opinion of the district court (App. 181a-213a) is reported at 346 F. Supp. 2d 538.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT

These cases purport to be brought on behalf of tens of millions of residents of South Africa claiming harm from that country's former policy of apartheid. Invoking the ATS, 28 U.S.C. § 1350, plaintiffs sued more than 50 U.S. and foreign corporations on the theory that, by doing business in or with South Africa, defendants "aided and abetted" violations of international law committed by the apartheid-era regime. This litigation has been condemned repeatedly by South Africa's current, democratically elected government as a "completely unacceptable" infringement of that nation's sovereignty that is incon-

sistent with its domestic policy of reconciliation. App. 312a. The United States has also objected to continuation of these suits, explaining that the litigation has created tension in this country's relations with South Africa and other allies, is inconsistent with the United States' strong support for South Africa's reconciliation policy, and undermines the policy of commercial engagement that often is an important element of U.S. diplomacy. App. 236a-282a. Citing the views expressed by South Africa and the United States, this Court previously identified *these particular cases* as ones where "a policy of case-specific deference to the political branches" could well preclude "relief in the federal courts for violations of customary international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

In the decision below, however, a divided panel of the Second Circuit refused to defer to the position of the Executive Branch or, indeed, even to address the views expressed by the U.S. and South African governments. Instead, the court held that the ATS confers jurisdiction to resolve plaintiffs' claims and remanded for what is certain to be years of additional litigation. This ruling is causing *present* injury to important interests of the United States and the Republic of South Africa. It undercuts decisions taken by the political branches on matters of foreign policy. And it encourages what already was a growing flood of creative litigation under the ATS, disregarding *Sosa*'s admonition that novel theories of international law do not support an ATS action. Review by this Court is imperative.

A. Apartheid And Its Aftermath

1. South Africa's system of apartheid was strongly condemned by other nations. The best way

to achieve reform in South Africa, however, was the subject of considerable debate in the United States and other nations. The United States ultimately adopted a policy of "constructive engagement," determining that commerce with South Africa would help end apartheid.

President Reagan, by Executive Order, encouraged U.S. companies doing business in South Africa to follow "fair labor principles," and restricted trade only in limited categories of goods. Exec. Order No. 12,532, §§ 2(a), (c), 50 Fed. Reg. 36,861, 36,862-63 (Sept. 9, 1985). Similarly, the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (repealed 1993) – which "set[] out United States policy toward the Government of South Africa, the victims of apartheid, and the other states in southern Africa," and established "a comprehensive and complete framework to guide the efforts of the United States" toward South Africa (100 Stat. at 1089) – imposed targeted sanctions on specific types of trade but otherwise generally permitted commerce with South Africa. Congress rejected competing bills calling for stricter sanctions. See S. Rep. No. 99-370, at 5 (1986).

Most other developed nations likewise rejected wholesale economic withdrawal from South Africa. See *State Department Report to Congress on Industrialized Democracies' Relations With and Measures Against South Africa* (1987). Although regulation of South African commerce took diverse forms, all of the home countries of the foreign corporations that are defendants here permitted commerce generally in and with South Africa. *Ibid.*

2. Apartheid began to crumble in the late 1980s. South Africa adopted an interim Constitution in

1993 and elected its first multiracial democratic government, led by President Nelson Mandela, in 1994. See App. 301a.

A central goal of the new government was, as the interim Constitution put it, the "pursuit of national unity," which required "reconciliation" of South Africa's people and "reconstruction" of its society. S. AFR. (Interim) CONST. 1993 at ch. 15 § 250. To that end, Parliament established a Truth and Reconciliation Commission (TRC) charged with "promot[ing] national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past." The Promotion of National Unity and Reconciliation Act 34 of 1995, ch. 2 s. 3(1) (TRC Act). Parliament also created a systematic process for addressing reparations (see TRC Act, ch. 5), as "part of the broader project of national reconciliation and nation building." Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155, 1163 (2004). The President eventually authorized and Parliament approved payment of reparations to some 20,000 individual victims identified by the TRC. *Ibid.*

Reviewing this process, the Constitutional Court of South Africa concluded: "without a firm and generous commitment to reconciliation and national unity," the difficult task of building a new democratic order could not have been achieved. *AZAPO v. President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC) at 1196 (S. Afr.). That approach has been widely lauded as a model for other nations making a transition to democracy. See Andrews, *supra*, at 1158.

B. Proceedings Below

1. This litigation involves eleven suits brought purportedly on behalf of all persons living in South Africa between 1948 and 1994 who were injured by apartheid. Defendants are more than 50 major U.S. and foreign corporations that allegedly did business in South Africa during the apartheid era. Plaintiffs seek to recover under the ATS, which grants federal courts jurisdiction over claims brought by aliens "for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. They assert that apartheid violated international law and that the ATS allows a U.S. court to impose liability on any corporation that operated in South Africa, on the theory that such a corporation "aided and abetted" apartheid.

None of plaintiffs' many complaints and amended complaints alleges that defendants took specific steps for the purpose of furthering apartheid or asserts a causal connection between any particular plaintiff's injuries and any defendant's conduct. Instead, as the dissenting judge below accurately characterized them, the complaints contend generally that, had defendants not done business in South Africa, "'[a]partheid would not have occurred *in the same way*.'" App. 83a (opinion of Korman, J., quoting one complaint; emphasis by court). Thus, "car companies are accused of selling cars, computer companies are accused of selling computers, banks are accused of lending money, oil companies are accused of selling oil, and pharmaceutical companies are accused of selling drugs." App. 82a. Along with other forms of relief, plaintiffs seek damages exceeding $400 billion.

2. The South African government – after "an extensive discussion both at Cabinet committee level and in the full Cabinet" (App. 304a) – submitted to the district court an unsolicited sworn declaration of its Minister of Justice and Constitutional Development setting forth its view that, "as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed" (App. 298a).[1] This declaration described the extensive measures taken since 1994 by the democratically elected governments of South Africa to address the legacy of apartheid. It explained that, "[i]n taking these constitutionally-mandated steps, the government deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and good will." App. 299a.

The current litigation, the South African government continued, "will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction," interfere with "matters of domestic policy which are pre-eminently South African," and "discourage much-needed direct foreign investment in

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[1] When the issue was debated in South Africa's parliament, the Minister of Trade and Industry stated: "[W]e are opposed to and indeed contemptuous of attempts to use unsound extra-territorial legal precepts in the [United States] to seek personal financial gain in South Africa. * * * The government rejects the actions of legal practitioners in the USA to exploit our history." App. 96a (citing C.A. App. A00754-55). The Minister of Education stated: "South Africa must settle this issue for [itself] and does not need the help of ambulance chasers and contingency fee operators, whether [in European countries] or the United States of America." App. 97a (citing C.A. App. A00758).

South Africa." App. 308a. Quoting South African President Thabo Mbeki, the declaration stated that the South African government considers it "completely unacceptable that matters * * * central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well being of our country." App. 312a.

The United States also urged dismissal, expressing concern that "continued adjudication * * * risks potentially serious adverse consequences for significant interests of the United States." App. 244a. It explained that

> we are sensitive to the views of the South African government that adjudication of these cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations.

App. 245a. The United States further noted that other foreign governments "have expressed their profound concern" about the effect of this litigation on their corporate citizens, raising the prospect of "continuing tensions in our relations with these countries over the litigation." App. 245a. And the United States described the broader adverse economic and diplomatic implications of these suits, observing that the litigation will "discourage" corporations "from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions." App. 246a.

3. Defendants moved to dismiss the suits. While the motions were pending, this Court decided *Sosa*. The Court held that the ATS is a jurisdictional statute that "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." 542 U.S. at 712. *Sosa* instructed that, before recognizing any new category of ATS claim, a court must determine whether the alleged violation of international law has "definite content and acceptance among civilized nations" equivalent to those of the limited number of 18th-century violations (such as piracy) that the statute was enacted to address. *Id.* at 732. In addition, a court must consider "the practical consequences of making that cause [of action] available to litigants in the federal courts," including the problems that can occur when U.S. courts make decisions directly affecting diplomatic relations and foreign policy. *Id.* at 732-33.

Sosa also explained that "[t]his requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law." *Id.* at 733 n.21. Suggesting that adjudication of ATS cases could be denied based on "a policy of case-specific deference to the political branches," the Court offered these cases as an illustration of litigation raising particular diplomatic and political concerns:

> [T]here are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. The Government of South Africa has said that these cases interfere with the pol-

> icy embodied by its Truth and Reconciliation Commission[.] * * * The United States has agreed. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.

Ibid. (citations omitted).

4. The district court dismissed the cases. App. 213a. Relying on *Sosa*, the court found "that aiding and abetting international law violations" is not "itself an international law violation that is universally accepted as a legal obligation." App. 197a. And citing *Sosa*'s reference to "case-specific deference to the political branches," the district court also held that the "collateral consequences" of permitting the cases to go forward mandate dismissal. App. 200a. The court placed "great weight" on the submissions of South Africa and the United States describing how this litigation would interfere with South Africa's ability to "handle domestic matters" and "hamper the policy of encouraging positive change in developing countries via economic investment." App. 205a-206a.

5. On plaintiffs' appeal, South Africa and the United States submitted briefs reiterating their view that these suits should be dismissed. But a divided panel of the Second Circuit reversed dismissal of the complaints. App. 20a.

The majority ruled that the ATS establishes jurisdiction over plaintiffs' claims, holding "that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]." App. 12a. The members of the majority, however, disagreed on the source of and standard governing that rule. Judge Katzmann looked primarily to *international criminal*

law, concluding that an ATS plaintiff must show that the defendant acted with the purpose of facilitating the primary violation (App. 32a-48a); Judge Hall grounded his rule in *domestic civil* law of secondary liability and would not require a showing of purpose to assist the violation (App. 65a-71a, 76a).

The majority concluded that these determinations were sufficient to establish jurisdiction under the ATS, but declined to address the practical considerations that might militate against recognition of a cause of action for aiding and abetting. See App. 14a-18a.

In addition, the majority upheld jurisdiction over the ATS claims seeking to hold defendants *directly* liable for genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, Nov. 4, 1988, 102 Stat. 3045, 78 U.N.T.S. 277, despite Congress's enactment of 18 U.S.C. § 1092, which precludes private actions for enforcement of that Convention. App. 60a-61a & n.18, 76a.

Notwithstanding the submissions of the United States and South Africa, the majority refused to address the related doctrines of "case-specific deference," political question, and international comity, asserting that the district court had not considered those issues. App. 14a-18a. Suggesting that plaintiffs may seek to amend their complaints on remand, the majority invited the district court "to solicit anew the views of" the United States and South Africa. App. 18a n.3.

Judge Korman dissented in substantial part. App. 79a-180a. He took issue with the separate analyses of ATS aiding and abetting liability offered by both members of the majority (App. 154a-180a)

and with their view that direct liability could be pursued under the Genocide Convention (App. 142a-143a).

Judge Korman also explained, in detail, his view that the litigation should have been dismissed on grounds of case-specific deference "at the threshold" (App. 115a):

> (1) the Supreme Court in *Sosa* * * * has instructed us that this is the very sort of case in which jurisdiction should not be exercised; (2) the State Department has filed a persuasive Statement of Interest in this matter urging dismissal because of the adverse effect the continued prosecution of these cases would have on the interests of the United States and our relations with other countries; and (3) the Republic of South Africa, a democratically elected government representative of all South Africans, including the victims of apartheid, has asserted the right to define and finalize issues related to reparations for apartheid-era offenses within its own legal framework – thus making this lawsuit an insult to the post-apartheid, black majority government of a free people.

App. 86a.

6. The panel, again by a divided vote, denied defendants' motion to stay the mandate. App. 214a-235a. Repeating its view that the issues of political question and case-specific deference had not been addressed by the district court, the majority instructed the district court on remand to assess the validity of the interests asserted by the United States and by the elected government of South Africa

by considering "the competing views" about South Africa's sovereign interests and U.S. foreign policy expressed by various South African non-governmental entities supporting plaintiffs. App. 220a n.2.

Judge Korman again dissented. Noting "what can only be described as an extraordinary discussion of" this litigation in *Sosa*, Judge Korman explained that the district court *did* apply the doctrine of case-specific deference (App. 223a, 227a-232a) and concluded that "[t]he continued prosecution of this matter constitutes a continuing insult to the Republic of South Africa and a continuing irritant to our relationship with the post-apartheid government" (App. 225a). He also noted the danger that "the Republic of South Africa could be forced into an evidentiary hearing to defend the validity of its objection," explaining that "the majority contemplates a remand that would subject a foreign democratic nation to the indignity of having to defend policy judgments that have been entrusted to it by a free people against an attack by private citizens and organizations who have lost the political battle at home. This dispute is not the business of the Judicial Branch of the United States." App. 226a-227a. He concluded that "this case is worthy of certiorari." App. 234a.

7. Within a week after the Second Circuit released its decision, the South African government expressly condemned the holding, reaffirming its view "that the case is directly related to the sovereignty of the South African state and should be resolved through South Africa's own democratic processes. We submit that another country's courts should not determine how ongoing political processes in South Africa should be resolved." App. 310a (quo-

tations omitted). President Mbeki subsequently reiterated this view on the floor of South Africa's National Assembly, denouncing the decision as "judicial imperialism" that denied "the sovereign right of the people of South Africa to decide their future." App. 316a. President Mbeki approvingly quoted Judge Korman's observation that allowing this litigation to proceed would "send the message that the United States does not respect the ability of South African society to administer justice." App. 313a.

REASONS FOR GRANTING THE PETITION

This litigation, in which plaintiffs effectively ask a U.S. court to replace South Africa's democratically adopted policy of reconciliation with a massive program of reparations overseen by a U.S. judge, involves issues of the most fundamental practical and doctrinal importance. The government of South Africa, repeatedly and insistently, has labeled adjudication of these suits in U.S. courts an affront to its sovereignty that threatens to disturb its program of political reconciliation and impair its economic growth. The United States has added that these suits cause tension in this Nation's foreign relations and undermine its diplomacy. The Second Circuit's response was to propose remand proceedings that will put on trial the legitimacy of the South African government's consistently stated view about the effects of this litigation on its sovereignty. This holding misunderstands the judicial role and threatens to undermine vital interests of the United States.

The court of appeals was equally wrong in holding that civil liability for aiding and abetting a foreign nation's alleged violation of international law in its own territory is the sort of universally recognized norm of international law that this Court described

in *Sosa*. This ruling, which will accelerate a disturbing trend in the lower courts, takes the ATS well beyond the boundaries fixed in *Sosa*. It will encourage further litigation that does not belong in U.S. courts and that adversely affects U.S. foreign policy.

It has been more than four years since the State Department warned that "continued adjudication" of this matter "risks potentially serious adverse consequences for significant interests of the United States" (App. 244a), and nearly as long since this Court declared that "the Executive Branch's view of the case's impact on foreign policy" should be given "serious weight" (*Sosa*, 542 U.S. at 733 n.21) – precisely what the district court did. It is now time to bring this litigation to a close. As in other cases presenting matters of similar importance and sensitivity, the Court should "grant[] certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964).

I. THE SECOND CIRCUIT'S FAILURE TO DISMISS THIS CASE IN LIGHT OF ITS SIGNIFICANT AND IMMEDIATE EFFECT ON FOREIGN RELATIONS REQUIRES REVIEW BY THIS COURT.

In *Sosa*, the Court noted the importance of "deference to the political branches" on matters relating to the foreign relations of the United States, specifically identifying *this litigation* as a good candidate for deference. 542 U.S. at 733 n.21. But the Second Circuit expressly declined this Court's suggestion, instead remanding the matter for what certainly will be years of additional litigation.

This holding was wrong in two fundamental respects. The court of appeals' refusal to consider the deference question at the outset – thus prolonging litigation whose very pendency is an irritant to U.S. foreign relations – was itself a serious error. And appropriate deference does, in fact, mandate dismissal of the case. Review by this Court would do more than correct these errors; it also would provide essential guidance for the disposition of a growing category of cases that, by definition, involve difficult, important, and sensitive issues.

A. The Very Pendency Of This Litigation Is A Source Of Diplomatic Friction And Interferes With U.S. Foreign Policy.

This is a case where immediate resolution of the deference issue is essential because the litigation touches on matters "committed by the Constitution to the executive and legislative – 'the political' – departments of the government." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918).

The continued litigation of this matter, not just its possible outcome, is *itself* a direct intrusion on South Africa's sovereignty and an ongoing, significant irritant to the United States' relations with that nation. The South African government repeatedly has condemned these lawsuits as U.S. judicial overreaching that interferes with South Africa's reconciliation process – twice in express statements by that country's President. Yet the court below disregarded South Africa's views, adding to the insult by directing remand proceedings contemplating evidentiary hearings on the legitimacy of South Africa's domestic policy. App. 14a & n.8, 219a-220a & n.2, 226a-227a. It is difficult to imagine litigation that interferes with more fundamental domestic interests

of another nation or that more directly disturbs U.S. relations with that nation.

The decision below will have other unfortunate consequences for U.S. diplomacy. As the United States has stated, the ruling creates tension with many of the United States' key allies and trading partners, which have expressed "profound concern" (App. 245a) about their corporate citizens being haled into U.S. courts and forced to litigate whether they violated U.S. or international law by engaging in conduct that their home governments permitted and often encouraged.

At the same time, the Second Circuit's decision will disrupt the broader conduct of U.S. diplomacy: by threatening greatly expanded ATS liability, premised on ordinary commercial activity by multinational corporations, it will discourage companies from participating in international commerce and economic development in the many nations whose governments have imperfect human rights records, even where it is the explicit policy of the United States and other democracies to encourage commercial engagement as the best means of promoting social and political change.

B. Courts Must Address At The Earliest Opportunity Whether To Dismiss Cases That Threaten Interference With Foreign Relations.

In declining to address whether these cases should be dismissed on deference grounds at the "threshold," as Judge Korman urged (App. 115a), the Second Circuit intimated that it could not reach the deference issue without first deciding ATS jurisdiction. See App. 77a (Hall, J.) (criticizing Judge Kor-

man for "conflating the anterior question of the existence of subject-matter jurisdiction with the posterior question of justiciability"). But "'[i]t is hardly novel for a federal court to choose among threshold grounds'" for declining to reach the merits, even if those grounds are not, strictly speaking, jurisdictional. *Tenet* v. *Doe*, 544 U.S. 1, 6 n.4 (2005) (citation omitted). Accord *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007). Compelling considerations rooted in the Constitution's allocation of foreign affairs authority to the Executive Branch and Congress should have led the court of appeals to address *at the threshold* the matter of deference to the political branches.

Indeed, in sharp contrast to the Second Circuit, other courts of appeals have given proper weight to foreign policy considerations and dismissed ATS suits on political question grounds at the outset, even before reaching other arguments – including jurisdictional arguments – in support of a motion to dismiss.

Thus, in *Hwang Geum Joo* v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005), the D.C. Circuit found dispositive the Executive's statement that continued litigation would be detrimental to U.S. foreign policy, holding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine." *Id.* at 52 (citation omitted). The court chose to dispose of the case on that ground rather than address the existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act. *Id.* at 47-48. Similarly, in *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974 (2007), *petition for reh'g filed*, No.

05-36210 (9th Cir. Oct. 9, 2007), the Ninth Circuit pretermitted further adjudication of the many other issues in an ATS suit when it determined that "[a] court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy." *Id.* at 984. The court dismissed the case as presenting a nonjusticiable political question because the "foreign policy decision [at issue] is committed under the Constitution to the legislative and executive branches." *Id.* at 983.

This Court has recognized in a variety of contexts the importance of deciding at the threshold whether to terminate litigation that threatens significant national or governmental interests. In *Tenet*, for example, the Court, before addressing any other issue, affirmed the dismissal of plaintiffs' case under the "*Totten* bar," which precludes spies from suing the government to enforce secret espionage agreements. Allowing the case to proceed, the Court explained, would be "inconsistent" with a rule "designed not merely to defeat the asserted claims, but to preclude judicial inquiry." 544 U.S. at 6 n.4. Similarly, in cases involving governmental defendants, the Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation" (*Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991)) because "the central benefits" of immunity "would be forfeited" if courts delayed making a final decision on its availability (*Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993)).

The deference principle applicable here operates similarly, counseling against judicial inquiry in cases, like this one, where the litigation itself intrudes upon the political branches' conduct of foreign

affairs. Just as the value of sovereign immunity is lost if foreign states are compelled to endure the burdens of litigation before dismissal, so too would the purpose of deference be frustrated if litigation that harms foreign relations were unnecessarily prolonged. Accordingly, if a decision whether to dismiss this litigation is not made promptly, the central interests served by deferring to the Executive's primacy in foreign affairs will be forfeited and a "substantial public interest" "imperil[ed]." *Will* v. *Hallock*, 546 U.S. 345, 353 (2006).

The majority below also indicated that it was not addressing the political question and case-specific deference points because they had not been considered by the district court. App. 15a-18a, 220a n.2. But, as Judge Korman demonstrated, that simply is not so. App. 112a-114a, 229a-232a. And more fundamentally, as Judge Korman also showed, the importance of the interests at stake here means that the Second Circuit should have resolved this issue – which does not require development or consideration of a factual record – regardless of whether the district court addressed it. App. 114a-116a, 227a-229a. The Second Circuit accordingly erred when it refused to address the deference question. Correction of that error by this Court would reconcile the differing approaches of the court below and the District of Columbia and Ninth Circuits, providing valuable instruction on how the lower courts should treat matters of such sensitivity.

C. Dismissal Is Warranted Now Because This Suit Undermines The Foreign Policy Prerogatives Of The Political Branches.

The Second Circuit not only should have reached the question whether this litigation should continue, it also should have affirmed dismissal of these cases on deference grounds. For a federal court to disregard the judgment of the Executive Branch in these circumstances "would be imprudent to a degree beyond [the court's] power." *Hwang Geum Joo*, 413 F.3d at 53. Three related doctrines, those of case-specific deference, comity, and political question, limit the authority of federal courts to adjudicate matters that bear directly on international affairs and diplomatic relations. Each is implicated here.

1. In the specific ATS context, the Court has recognized a set of "principle[s] limiting the availability of relief in the federal courts for violations of customary international law," among them the "policy of case-specific deference to the political branches." *Sosa*, 542 U.S. at 733 n.21. Whether regarded as precluding recognition of a cause of action or as foreclosing a plaintiff's claim on justiciability grounds, this limitation means that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. Closely related considerations of comity, which take account of the interests of other nations, also strongly support this conclusion. See App. 93a-94a, 222a-223a (Korman, J.). Avoiding "adverse foreign policy consequences" thus can provide a compelling basis for dismissing particular ATS claims. *Sosa*, 542 U.S. at 728, 733 n.21.

More generally, as the D.C. and Ninth Circuits recognized in *Hwang Geum Joo* and *Corrie*, cases that would bring the Judiciary into conflict with the sovereign interests of foreign nations also may involve non-justiciable political questions because the resolution of such disputes "frequently turn[s] on standards that defy judicial application, or involve[s] the exercise of a discretion demonstrably committed to the executive or legislature." *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). Adjudicating such cases "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423. These decisions are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

2. This is an especially compelling example of litigation that the federal courts should not adjudicate because it so directly threatens the dangers identified in *Sosa*: it is a profound affront to South Africa's sovereignty, directly challenging that nation's right to decide how to complete the transition to an open, multiracial society. Plaintiffs would use the U.S. courts to obtain the type of large-scale monetary reparations that the South African government explicitly rejected in post-apartheid legislative and executive determinations. See App. 296a-309a. It would seem obvious that such a matter is not susceptible to "judicial handling" (*Baker*, 369 U.S. at 211-12), and is wholly inconsistent with comity principles (see *Bi* v. *Union Carbide Corp.*, 984 F.2d 582, 586 (2d Cir. 1993)). Any effort to reverse South Africa's post-apartheid policy of reconciliation should be resolved by the South African people

through their democratic system, not by a trial in a U.S. court.

This litigation also would require judicial second-guessing of the "constructive engagement" policy implemented by the United States and the home countries of the defendant companies during apartheid; indeed, plaintiffs' claims rest on the view that defendants' actions in accordance with this policy violated international law. The Court has noted the "serious and far-reaching consequences" that would flow from a judicial finding squarely at odds with the way in which the political branches have chosen to conduct international affairs. *Sabbatino*, 376 U.S. at 432. Deciding whether a rogue foreign government is better confronted with "an iron fist" or with "kid gloves" simply is not the "business" of the federal judiciary. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 427 (2003). That, presumably, is why *Sosa* pointed to this litigation as one in which "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." 542 U.S. at 733 n.21. The Court should now confirm what it strongly suggested in *Sosa*.

II. AIDING AND ABETTING CLAIMS ARE NOT COGNIZABLE UNDER THE ATS.

The Second Circuit made a second significant error by holding that civil aiding and abetting claims satisfy the *Sosa* standard as ones that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of piracy, assault on ambassadors, and safe conduct. *Sosa*, 542 U.S. at 725. The profoundly important question presented by the Second Circuit's holding –

which will both encourage and confuse ATS litigation – has in recent years been the subject of a substantial and burgeoning volume of litigation and considerable academic commentary.[2] The question whether an aiding and abetting claim may be stated under the ATS is an important one in its own right. The Court would bring needed clarity to broader ATS law by answering it.

A. The Lower Courts Need Guidance On Whether Aiding And Abetting Claims May Be Asserted Under The ATS.

1. The *Sosa* Court emphasized repeatedly its expectation that courts would permit litigation under the ATS only of an exceedingly "narrow," "modest," and "limited" category of claims (542 U.S. at 715, 720, 721, 724, 729) and would exercise "great caution in adapting the law of nations to private rights" (*id.* at 728). Although the Court said the door for such claims is "still ajar," it must be "subject to vigilant doorkeeping." *Id.* at 729. Since *Sosa* was decided, however, many plaintiffs and some lower courts have instead ripped the door from its hinges. In particular, claimants have filed a large and rapidly increasing number of lawsuits asserting ATS claims for aiding and abetting violations of international law.[3]

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[2] See, *e.g.*, Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007); Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 500-504 (2001).

[3] See, *e.g.*, *Corrie, supra* (allegations that Caterpillar aided and abetted international law violations by selling to Israeli military bulldozers used to demolish Palestinians' homes); *Does* v. *Chiquita Brands Int'l, Inc.*, No. 07-CV-10300, Compl. ¶¶ 495-499 (S.D.N.Y. Nov. 14, 2007) (allegations that food companies aided and abetted Colombian terrorists by paying them "protec-

These suits have brought confusion and uncertainty about the standards governing such claims. Some judges, like Judge Korman and the district court here (App. 164a-171a, 197a-200a), have concluded that accessorial liability does not satisfy *Sosa*'s strict standard. *Corrie* v. *Caterpillar, Inc.* 403 F. Supp. 2d 1019, 1026-27 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (2007), *and petition for reh'g filed*, No. 05-36210 (9th Cir. Oct. 9, 2007); *Doe* v. *Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir.), *petition for cert. filed*, 76 U.S.L.W. 3050 (U.S. July 20, 2007) (No. 07-81). Other lower courts disagree – although for varying reasons, as the separate

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tion" money); *Mastafa* v. *Australian Wheat Bd. Ltd.*, No. 07-CIV-7955, Compl. ¶¶ 29-45 (S.D.N.Y. Sept. 11, 2007) (allegations that Australian entity and French bank aided and abetted human rights violations of Saddam Hussein's regime by making illicit fee payments to Iraq in connection with U.N. oil-for-food program); *Mohamed* v. *Jeppesen Dataplan, Inc.*, No. 5:07-CV-02798, First Am. Compl. ¶¶ 256, 263 (N.D. Cal. Aug. 1, 2007) (allegations that Boeing subsidiary aided and abetted abuses by providing services to flights involved in the CIA's rendition program); *Xiaoning* v. *Yahoo! Inc.*, No. 07-CV-2151, Second Am. Compl. ¶ 2 (N.D. Cal. July 30, 2007) (allegations that Yahoo aided and abetted torture by providing access to human rights activist's electronic records; case settled); *Barboza* v. *Drummond Co.*, No. 06-CV-61527, Compl. ¶ 49 (S.D. Fla. Oct. 10, 2006) (allegations that coal company aided and abetted paramilitary forces suppressing labor activism; case dismissed); *Doe* v. *Wal-Mart Stores, Inc.*, No. 05-CV-7307, First Am. Compl. ¶¶ 47, 172-177 (C.D. Cal. Dec. 28, 2005) (allegations that Wal-Mart aided and abetted international law violations by failing to stop suppliers from committing labor abuses; case dismissed, appeal pending); *Doe* v. *Nestlé, S.A.*, No. 05-CV-5133, Compl. ¶¶ 35-37 (C.D. Cal. July 15, 2005) (allegations that defendants aided and abetted child labor abuses by purchasing cocoa and providing logistical support to cocoa farmers).

opinions below illustrate[4] – or simply fail to consider the impact of *Sosa* on the aiding and abetting issue.[5]

2. The need for guidance from this Court therefore is clear – especially because, for the reasons identified in *Sosa* itself, allowing ATS suits to proceed outside the narrow categories described in *Sosa* damages the broader national interest. As this case demonstrates, ATS suits often "raise risks of adverse foreign policy consequences" (542 U.S. at 728), even when the defendants are non-governmental entities. Such litigation threatens to establish U.S. courts as roving referees of foreign human rights disputes, assessing other nations' practices and reviewing the political branches' decisions regarding the propriety of commercial engagement with those nations. The magnitude of the potential impact on U.S. foreign relations is startling: pending ATS cases involve numerous countries, from Israel to China, Australia to Colombia. See *supra* note 3.

A civil aiding and abetting theory would greatly expand the reach and number of ATS actions. Traditionally, ATS suits have been curtailed by sovereign immunity and the principle that only nations are

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[4] Compare App. 32a-48a (Katzmann, J., concurring) (international law supplies aiding and abetting norm), *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-41 (S.D.N.Y. 2005) (same), and *Doe I* v. *Unocal Corp.*, 395 F.3d 932, 949-51 (2002) (same), *reh'g en banc granted*, 395 F.3d 978 (2003), *and vacated and appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) with App. 65a-76a (Hall, J., concurring) (federal common law), and *Unocal*, 395 F.3d at 965 (Reinhardt, J., concurring) (same).

[5] See, *e.g.*, *Aldana* v. *Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005); *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

bound by most international law norms. See, *e.g.*, *Sosa*, 542 U.S. at 720; *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). Permitting aiding and abetting claims enables plaintiffs to sue instead any of a universe of private parties who may bear some connection (however tenuous) to the alleged wrong – even when these parties could not themselves have violated the international law norm directly.

Moreover, in an aiding and abetting claim, accusations of direct human rights abuses are supplanted by far broader and more diffuse allegations – for example, that defendants "gave encouragement," provided "moral support," or "supplied resources" to governments engaged in violations of international law, or that they "benefited from" such violations. See, *e.g.*, App. 83a-84a, 187a; *Doe I*, 395 F.3d at 951-52 & nn.28-29. These sorts of allegations are easy to make but time-consuming and expensive to refute, and often impossible to defeat at the pleading or summary judgment stage.

If not cabined by clear and well-defined limits, moreover, ATS suits are uniquely subject to abuse. Corporations doing business across national borders often are attractive deep pockets for plaintiffs (and lawyers) inclined to bring strike suits. Because the allegations in these suits often turn on events occurring in far corners of the developing world, discovery is extraordinarily burdensome and expensive. In addition, the adverse publicity entailed by the inflammatory allegations enables plaintiffs to press for coercive settlements. The prospect of such strike suit payments will, in turn, spur the filing of many more such actions. For these reasons, ATS claims pose an even greater risk of vexatiousness than the securities

and antitrust class actions that this Court has seen the need to restrain. See, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005).

B. The Second Circuit's Recognition Of Civil Aiding And Abetting Liability Is Inconsistent With This Court's Decisions And Has No Basis In International Law.

The Second Circuit's aiding and abetting ruling misunderstood and misapplied this Court's decisions. *Sosa* permits a cause of action only for violations of a narrow set of international law norms that are universally "accepted by the civilized world and defined with a specificity" comparable to the "historical paradigms familiar when [the ATS] was enacted." 542 U.S. at 725, 732. The Court explained that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably, must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732. See also *id.* at 727 (adverse "collateral consequences" of ATS litigation).

Civil aiding and abetting liability does not fall within that "very limited set" of international law norms. *Id.* at 720. That is especially clear when the "practical consequences" of such claims are taken into account. The Second Circuit's contrary holding departs from *Sosa* and applies a standard that greatly, and improperly, expands the scope of the ATS.

1. While holding that an aiding and abetting claim satisfies the *Sosa* standard, the panel majority purported to decide only whether the ATS creates *jurisdiction*, leaving open the question whether practical or other limiting considerations might preclude recognition of an aiding and abetting *cause of action* under the ATS. App. 12a, 17a n.12. The Second Circuit majority understood *Sosa* to mean that ATS jurisdiction is proper only if the plaintiff's claim rests on allegations that satisfy *Sosa*'s requirement of a universally recognized norm – but that this jurisdictional inquiry is entirely divorced from any consideration of the limiting factors that might lead a court to decline to recognize a common law cause of action.

As Judge Korman showed and as other courts of appeals have recognized, however, this separation of the jurisdictional and cause of action inquiries misunderstands the ATS, which "is one of a number of statutes" in which "subject matter jurisdiction turns on whether the complaint states a cause of action." App. 117a (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 n.11 (2006)). See *Enahoro* v. *Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005) ("Because the ATS provides jurisdiction over a very limited number of claims and the jurisdictional grant is so closely tied to the claim, we need to examine whether there is a claim in this case which allows for the exercise of jurisdiction.").[6]

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[6] If the ATS were viewed, instead, as paralleling 28 U.S.C. § 1331, establishing jurisdiction whenever the plaintiff states a nonfrivolous claim, that too would provide no support for the approach taken below, which held the existence of jurisdiction

The Second Circuit's error on this point does more than confuse the law of jurisdiction. Its artificial division of the ATS analysis into jurisdictional and nonjurisdictional elements completely disregards this Court's admonition in *Sosa* that the determination whether an international law norm is sufficiently definite "inevitably must" take into account the practical consequences of permitting a cause of action. 542 U.S. at 732.

Moreover, the Second Circuit's approach creates considerable mischief. A separate ATS jurisdictional inquiry of the sort the Second Circuit purported to conduct here is a fruitless exercise as a practical matter because the existence of ATS jurisdiction is important only insofar as it allows adjudication of a cognizable common law cause of action. But precisely because the court of appeal's jurisdictional inquiry is divorced from the practical considerations that counsel caution in the creation of actionable rights grounded in international law, its analysis inevitably will – as it did in this case – litter the law with essentially advisory holdings establishing that particular norms of international law *are* sufficiently accepted and definite to satisfy *Sosa*'s standard. Such an approach is calculated to invite and prolong litigation. This Court's guidance therefore is urgently needed to clarify the law of ATS jurisdiction.

2. That is not the end of the Second Circuit's error: its misunderstanding of *Sosa*'s standard led to its erroneous determination that aiding and abetting claims *do* satisfy the "definite content and accep-

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to turn on *satisfaction* of *Sosa*'s acceptance and specificity standards.

tance" standard. In fact, a purported international law norm imposing civil liability upon alleged aiders and abettors falls further outside the "very limited set" of actionable international law standards than the proposed rule against arbitrary detention that the Court rejected in *Sosa*. 542 U.S. at 734-38.

As Judge Korman showed (App. 138a-154a) and as commentators have explained, the "gap between international aspirations and enforceable ATS claims that was too large in *Sosa* is significantly larger with respect to corporate [civil] aiding and abetting liability for human rights abuses." Bradley *et al.*, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 928 (2007). No treaty ratified by the United States imposes such liability; the Restatement (Third) of Foreign Relations Law of the United States does not recognize it; and other nations do not uniformly and regularly impose it. *Ibid.* Even as a matter of *domestic* law, where aiding and abetting is "an ancient criminal law doctrine," its application in civil law "has been at best uncertain" and "there is no general presumption that the plaintiff may * * * sue aiders and abettors." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181-82 (1994). Where, as here, creating a private right of action would require "exercising innovative authority over substantive law," the decision to do so is "better left to legislative judgment." *Sosa*, 542 U.S. at 726, 727.

3. The lack of uniformity in the relevant body of law is reflected in the divergent – but equally insupportable – approaches taken by the two members of the Second Circuit majority. In his concurrence, Judge Katzmann disregarded the complete absence

of international authorities imposing *civil* aiding and abetting liability by looking instead to international authorities involving *criminal* law. See App. 32a-48a. But leaping from criminal to civil aiding and abetting liability is inappropriate. While prosecutorial discretion and heightened procedural safeguards protect against the risk of indiscriminate and disproportionate liability in the criminal setting, anyone who asserts injury can commence a civil aiding and abetting action. *Cf. Sosa*, 542 U.S. at 727 ("The creation of a private right of action raises issues * * * [such as whether] to permit enforcement without the check imposed by prosecutorial discretion."). The Court made just that point in the domestic context in *Central Bank*. 511 U.S. at 181-82.[7] Moreover, the vastly different contexts in which international law authorities discuss criminal aiding and abetting do not furnish answers to a variety of complicated questions associated with civil liability, such as the operation of doctrines like joint and several liability. There could hardly be a clearer example of a tort claim that lacks the "definite content" required by *Sosa*.

Judge Hall, in contrast, derived civil aiding and abetting liability from domestic rather than international law principles. App. 65a-76a. That approach,

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[7] In addition, as Judge Korman recognized, even if the international criminal cases were relevant, they provide no basis for the recognition of aiding and abetting liability here. App. 164a-180a. See *United States* v. *von Weizsaecker* (Ministries Case), 14 Trials of War Criminals Before the Nurnberg Military Tribunals 621-22 (Military Tribunal IV A 1949) (rejecting the standard of accessorial liability the Second Circuit accepted here).

however, disregards *Sosa*'s requirement that "*international law* extend[] the scope of liability for a violation of a given norm to the perpetrator being sued." 542 U.S. at 732 n.20 (emphasis added). Moreover, even if domestic law could properly be invoked to define a tort claim for violating the "law of nations," this Court's decision in *Central Bank* – and its holding that there is no presumptive aiding and abetting liability even where "Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm" (511 U.S. at 182) – requires the rejection of such liability here.

Both members of the Second Circuit majority, moreover, disregarded the district court's careful consideration of the practical consequences of recognizing an aiding and abetting cause of action. App. 194a, 200a. Even if the definiteness of the international law norm were a closer question, these considerations would preclude recognition of aiding and abetting claims.

4. Finally, one additional consideration militates powerfully against application of the ATS in this context. Plaintiffs seek to use the federal courts to hold private parties liable for actions taken by a foreign sovereign in its own territory with respect to its own citizens, and in which the challenged primary conduct took place outside the United States. Indeed, their claims rest entirely on extraterritorial application – to conduct occurring in South Africa – of a common law cause of action created by a federal court. It is fundamental, however, that domestic legislation is presumed to apply only within the territorial jurisdiction of the United States. See, *e.g.*,

EEOC v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

So far as the ATS in particular is concerned, restrictions on the authority of courts to recognize new rights of action are at their zenith where the rule being enforced would "claim a limit on the power of foreign governments over their own citizens"; such claims should be "undertaken, if at all, with great caution." 542 U.S. at 727-28. See *id.* at 761 (Breyer, J., concurring). That enterprise is all the more dubious where, as here, the successor to the objectionable government, despite having repudiated its predecessor's policies, has expressed its steadfast opposition to the U.S. litigation. To proceed with an ATS suit in the face of these concerns would transform a statute designed to ease international tension (see *id.* at 715-18) into a device for exacerbating it. See *id.* at 761 (Breyer, J., concurring). It seems most improbable that this is the sort of "vigilant doorkeeping" the Court intended in *Sosa*.

III. Courts May Not Impose Direct Liability Under The ATS In The Face Of Contrary Instructions From Congress.

In addition to permitting plaintiffs' aiding and abetting claims to go forward, the panel majority also permitted plaintiffs to attempt to hold petitioners liable for *directly* violating international law by committing genocide. App. 60a-61a & n.18, 76a. Like its expansive holding on aiding and abetting, that ruling misunderstands the primacy of Congress and the limited judicial role in the creation of common law causes of action. It also cannot be reconciled with the Seventh Circuit's holding that action by Congress in a particular area precludes judicial creation of a

common law cause of action under the ATS in that same area.

When Congress enacted the Genocide Convention Implementation Act of 1987, it made genocide a criminal offense. See Pub. L. No. 100-606, 102 Stat. 3045 (codified at 18 U.S.C. § 1091). At the same time, however, Congress expressly barred private parties from pursuing civil claims for genocide. It provided that the creation of criminal liability was not to "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. § 1092.

That congressional determination is fatal to the direct liability claim in this case. As *Sosa* explained, courts should generally "look for legislative guidance before exercising innovative authority under substantive law" (542 U.S. at 726), and "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" (*id.* at 727). The force of these warnings is most compelling where, as here, a court would be acting not merely against a backdrop of congressional silence, but in the teeth of "a clear indication from the political branches that a 'specific, universal, and obligatory' norm against genocide is not to be enforced through a private damages action." *Id.* at 749 (Scalia, J., concurring). The panel majority did not heed these warnings, however, and instead opened the door to private liability for genocide under the ATS.

This important issue is independently worthy of review. Not only is the majority's determination in palpable tension with *Sosa*, it also conflicts with the Seventh Circuit's decision in *Enahoro*, which held that Congress, by expressly providing a cause of ac-

tion for torture in the Torture Victim Protection Act, 28 U.S.C. § 1350 note, *precluded* the federal courts from recognizing a separate common law cause of action for torture under the ATS. See 408 F.3d at 884-86. The same principle that makes it "hard to imagine" that common law claims for torture are permissible where Congress "has specifically provided a cause of action" (*id.* at 886) surely also precludes recognition of common law genocide claims where Congress has specifically decided *not* to provide such a cause of action. Here, as in other aspects of its other holding, the Second Circuit substituted judicial judgment for that of the political branches. That error warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
MARC R. COHEN
ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

FRANCIS P. BARRON
Counsel of Record
DAVID GREENWALD
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel for UBS AG

DAVID T. BIDERMAN
JASON A. YURASEK
Perkins Coie LLP
Four Embarcadero Center
Suite 2400
San Francisco, CA 94111
(415) 344-7000
Counsel for American Isuzu Motors Inc.

JOHN H. BEISNER
KARL R. THOMPSON
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
Counsel for Bank of America, N.A., The Dow Chemical Company, and Ford Motor Company

MARC J. GOTTRIDGE
Lovells LLP
590 Madison Avenue
New York, NY 10022
(212) 909-0600
Counsel for Barclays Bank PLC

JOSHUA DYCKMAN
Counsel
Bristol-Myers Squibb Company
345 Park Avenue
New York, NY 10154
(212) 546-4258
Counsel for Bristol-Myers Squibb Company

JOHN L. WARDEN
BRUCE E. CLARK
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
Counsel for BP p.l.c.

JAYANT W. TAMBE
ROBERT A. MITTELSTAEDT
Jones Day
222 East 41st Street
New York, NY 10017
(212) 326-3939
Counsel for Chevron-Texaco Corporation and Chevron Texaco Global Energy, Inc.

OWEN C. PELL
KAREN M. ASNER
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200
Counsel for Citigroup, Inc.

ALAN M. GRIMALDI
PATRICIA G. BUTLER
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 383-6989
Counsel for The Coca-Cola Company

PETER C. HEIN
WILLIAM EDWARDS
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
(212) 403-1000
Counsel for Colgate-Palmolive Company

TERRY MYERS
ANTHONY A. DEAN
THOMAS R. VALEN
JEFFREY L. NAGEL
Gibbons P.C.
One Pennsylvania Plaza
37th Floor
New York, NY 10119
(212) 613-2000
Counsel for Commerzbank AG and Dresdner Bank AG

ROGER M. WITTEN
LOUIS R. COHEN
JOHN A. TRENOR
PAUL M. WINKE
KEVIN L. OBERDORFER
Wilmer Cutler Pickering Hale and Dorr LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800
Counsel for Credit Suisse Group

JEROME S. HIRSCH
SUSAN L. SALTZSTEIN
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522
(212) 735-3000
Counsel for Daimler AG

JEFFREY BARIST
SANDER BAK
FELIX WEINACHT
Milbank Tweed
One Chase Manhattan Plaza
New York, NY 10005
(212) 530-5000
Counsel for Deutsche Bank AG

EVAN R. CHESLER
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
Counsel for E.I. Dupont deNemours

GRAEME W. BUSH
ELIZABETH G. TAYLOR
Zuckerman Spaeder LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800
Counsel for EMS-Chemie (North America) Inc.

JAMES W. QUINN
ARVIN MASKIN
KONRAD L. CAILTEUX
CAITLIN HALLIGAN
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
Counsel for Exxon Mobil Corporation

MARK D. MCPHERSON
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104
(212) 468-8000
Counsel for Fujitsu Limited

PAUL R. FRIEDMAN
JOHN TOWNSEND RICH
WILLIAM F. SHEEHAN
Goodwin Procter LLP
901 New York Avenue, NW
Washington, D.C. 20001
(202) 346-4000
Counsel for General Electric Company

ROBERT S. WALKER
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-7249
Counsel for General Motors Corp.

JAYANT W. TAMBE
Jones Day
222 East 41st Street
New York, NY 10017
(212) 326-3939
Counsel for General Motors Corp

JOHN F. SCHULTZ
KRISTOFOR T. HENNING
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
Counsel for Hewlett-Packard Company

ALEX C. LAKATOS
KEVIN S. RANLETT
ALICIA K. KINSEY
Mayer Brown LLP
1909 K Street, NW
Washington, D.C. 20006
(202) 263-3000
Counsel for Holcim (US) Inc.

CHRISTOPHER LANDAU, P.C.
BRANT W. BISHOP
JOHN K.D. CRISHAM
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Suite 1200
Washington, DC 20005
(202) 879-5000
Counsel for Honeywell International Inc.

KEITH R. HUMMEL
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
Counsel for International Business Machines Corporation

JAMES B. WEIDNER
RAE LINDSAY
Clifford Chance US LLP
31 West 52d Street
New York, NY 10019-6131
(212) 878-8000
Counsel for JPMorgan Chase & Co.

JOHN E. HALL
FUAD RANA
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-6000
Counsel for 3M Co.

KEVIN J. WALSH
Locke Lord Bissell & Liddell LLP
885 Third Avenue
New York, NY 10022
(212) 947-4700
Counsel for National Westminster Bank Plc

MICHAEL O. WARE
BRIAN M. WILLEN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500
Counsel for Nestlé USA, Inc.

RORY O. MILLSON
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
Counsel for Shell Oil Company

SANDRA C. GOLDSTEIN
Cravath, Swaine & Moore LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
Counsel for Xerox Corporation

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